

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**IN RE: GENERIC PHARMACEUTICALS
PRICING ANTITRUST LITIGATION**

**THIS DOCUMENT RELATES TO:
ALL ACTIONS**

**MDL NO. 2724
16-MD-2724**

HON. CYNTHIA M. RUGE

DEFENDANTS' STATUS REPORT

Pursuant to Pretrial Order No. 13 (MDL Dkt. No. 196), Defendants hereby submit the enclosed status report setting forth suggestions for the management of the MDL. For ease of reference, Defendants have divided the status report into five sections, corresponding with the agenda submitted by the parties on April 20, 2017.

- I. REPORT ON STATUS OF CASES TRANSFERRED INTO THE MDL AND POTENTIAL TAG-ALONGS**
- II. DOCKETING AND ADMINISTRATION OF MDL**
- III. SCHEDULING AND MANAGEMENT OF CASES**
- IV. GOVERNING PROTOCOLS – PROTECTIVE ORDER, ESI PROTOCOL, AND PRESERVATION ORDER**
- V. LEADERSHIP AND LIAISON COUNSEL**

I. REPORT ON STATUS OF CASES TRANSFERRED INTO THE MDL AND POTENTIAL TAG-ALONGS

Defendants and Plaintiffs have conferred and Defendants incorporate Section I of Plaintiffs' status report herein, which includes a chart of cases transferred into the MDL and potential tag-alongs.

II. DOCKETING AND ADMINISTRATION OF MDL

Defendants have conferred with Plaintiffs regarding certain docketing and filing procedures for various different cases that comprise this MDL. Defendants agree that No. 16-MD-2724 be maintained as the master docket in this MDL and that separate docket numbers be created underneath the master docket number for each generic pharmaceutical case. Defendants also agree that there should be "... a system for identifying filings that apply only to DPP, EPP, or IRP cases[.]" (Plaintiffs' Status Report, Section II n.1.) For clarity and to avoid confusion, Defendants believe that within each individual generic pharmaceutical docket, there should be a sub-docket for each Plaintiff class (i.e., DPPs, EPPs, and IRPs). Each filing would therefore contain a caption listing the master docket, the generic pharmaceutical and docket number, and the sub-file docket number specifying which plaintiff actions to which that filing is applicable. Defendants agree with Plaintiffs "that the structure of the dockets should be established based on the preferences of the Clerk of Court working in conjunction with all Parties." (*Id.*)¹

III. SCHEDULING AND MANAGEMENT OF CASES

Defendants submit that the following scheduling and case management processes and procedures should be implemented across all actions.

¹ The Proposed Pretrial Order Plaintiffs attached to Section II of Plaintiffs' status report is acceptable to Defendants, except that it should include sub-file docket numbers specifying which plaintiff actions to which that filing is applicable.

A. Consolidated Amended Complaints

Defendants propose that once Lead Plaintiffs' Counsel have been appointed, Plaintiffs in all cases must file Consolidated Amended Complaints so that there are no longer any overlapping/conflicting class action complaints pending.² Based on the complaints filed to date, Defendants propose that a single Direct Purchaser Consolidated Class Action Complaint and a single End Payor Consolidated Class Action Complaint should be filed for each of the individual drugs that are the subject of the pending complaints. This procedure will avoid unnecessary duplication, inconvenience and confusion caused by having multiple, overlapping complaints on behalf of the same putative classes of purchasers of the same drug. Defendants propose that Consolidated Amended Complaints be required to be filed within 30 days of the appointment of Lead Plaintiffs' Counsel.

B. Responsive Pleadings and Motions To Dismiss

Defendants further propose that the scheduling of responsive pleadings and motions to dismiss in all cases should be done in the most efficient way so that the Court is not deciding motions to dismiss in all of these cases at the same time. To ensure that the Court and the parties can devote the necessary time and attention to each of these important motions, Defendants suggest that motions proceed with respect to an initial, limited number of cases to be identified after Lead Plaintiffs' Counsel have been appointed. After rulings on motions in this initial group of cases, a schedule and process would be set for filing motions to dismiss in the remaining cases.

² Rouses Point Pharmaceuticals, LLC ("Rouses Point") opposes the consolidation of complaints in the Propranolol actions. Rouses Point is named as a defendant, with no specific facts pleaded against it, in only two of seven End Payor Propranolol actions, and has not been named in the three Direct Purchaser Propranolol actions, or any other product case. It should not reflexively be added to a much broader consolidated complaint. (See Pretrial Order No. 1, para 2.B.)

Subject to the Court's agreement with this approach, Defendants propose that counsel, within 10 business days of appointment of Lead Plaintiffs' Counsel, confer and submit a proposed schedule (or schedules if agreement cannot be reached by all parties) for the filing and briefing of motions to dismiss in an initial set of cases, consistent with the approach of grouping as discussed above.

The Propranolol Defendants recognize that their cases are somewhat differently situated in light of the motions to dismiss that were decided in the Propranolol cases pending in the Southern District of New York before Judge Rakoff, on the same day that the JPML transferred those cases to this Court. Assuming that Plaintiffs will be required to file new consolidated complaints, and because Judge Rakoff's decision relied on Second Circuit law (indeed, Judge Rakoff explicitly declined to follow Third Circuit authority), and that the decision was issued *after* the JPML issued its order centralizing the Propranolol cases in this Court, Defendants in those cases respectfully request that the Court allow renewed briefing on a motion to dismiss under Third Circuit law.

C. Case Management After Responsive Pleadings and Motions to Dismiss

Defendants submit that there should be no discovery with respect to any given action pending resolution of a motion to dismiss that action. The United States Supreme Court recognized in its seminal *Twombly* decision the extraordinary discovery burdens placed upon defendants in antitrust cases, and the need for courts to carefully scrutinize antitrust complaints at the motion to dismiss stage. Until this Court determines that a Plaintiff is entitled to impose those heavy burdens and expenses in a particular case, Defendants submit that discovery is not appropriate. It is premature to establish a full discovery and case management schedule for this MDL or any case within it until the Court rules on a motion to dismiss.

IV. GOVERNING PROTOCOLS – PROTECTIVE ORDER, ESI PROTOCOL, AND PRESERVATION ORDER

To promote the efficiencies sought by the JPML, Defendants propose that each case should be governed by separate -- but substantively identical -- ESI Protocols, Document Preservation Orders and Protective Orders (collectively, “Document Production Orders”), which would be captioned in each of the different cases.³

These substantively identical Document Production Orders across the cases will avoid unnecessary expense and confusion.⁴ Numerous Plaintiffs and Defendants are parties in multiple actions involving different drugs. Accordingly, having a single, standard document production process across all cases will simplify document review and production, and ensure that different and potentially conflicting obligations and processes are not imposed on these parties.

To achieve this objective, Defendants propose that within 14 business days of the appointment of Lead Plaintiffs’ Counsel for the different cases, the parties shall meet and confer to discuss the terms of Document Production Orders. Upon conclusion of those discussions, the parties shall submit, through Liaison Counsel, for the Court’s consideration either: (1) joint proposed Document Production Orders; or (2) competing proposed Document Production Orders, along with short submissions setting forth their positions.

V. LEADERSHIP AND LIAISON COUNSEL

In accordance with Paragraph 4.A of Pretrial Order No. 1 (ECF No. 2), Pretrial Order No. 3 (ECF No. 37), the Transfer Order of the United States Judicial Panel on Multidistrict Litigation

³ Separate orders are required because the various cases have different plaintiffs and defendants, and concern different drugs; the relevant document sets will therefore differ.

⁴ In the event parties have already made document productions pursuant to Document Production Orders entered by a different court, as has occurred in the Propranolol cases that had been pending in the Southern District of New York, in order to promote efficiency, document production in those cases should be governed by the same standards set out in those orders. Once Plaintiffs’ leadership is settled, the parties can meet and confer on this issue at the appropriate time.

(ECF No.194), and Pretrial Order No. 13 (ECF No. 196), Defendants have conferred, reached consensus, and respectfully request the expansion of Defendants' liaison counsel to include representatives from each individual drug case. The following counsel and firms, who collectively represent at least one Defendant in each of the individual drug cases, can act as a defense liaison group for coordination with the Court and for administrative purposes for any global case-issues.

- **Jan P. Levine**, Pepper Hamilton LLP. Ms. Levine currently serves as Defendants' liaison counsel pursuant to the Court's Pretrial Order No. 3 (ECF No. 37). Defendants respectfully request that Ms. Levine continue to serve in her current role as Defendants' liaison counsel.
- **Chul Pak**, Wilson Sonsini Goodrich & Rosati PC. Mr. Pak has represented defendants in numerous multi-district antitrust class action cases, including *In re Capacitors Antitrust Litigation* (N.D. Cal., 14-cv-03264-JD), *In re SRAM Antitrust Litigation* (N.D. Cal., M:07-cv-01819-CW) and *In re Photochromic Lens Antitrust Litigation* (M.D. Fl., 8:10-md-2173-JDW-EAJ). Mr. Pak's curriculum vitae is attached as Exhibit 1 for the Court's consideration.
- **Sheron Korpus**, Kasowitz Benson Torres LLP. Mr. Korpus has represented defendants in significant multi-district antitrust class actions, including *Behrend v. Comcast Corp.* (E.D. Pa., 03-6604), *Kristian v. Comcast* (D. Mass., 03-12466-EFH), *In re Air Cargo Shipping Services Antitrust Litig.* (E.D.N.Y., 06-MD-1775 (JG)(VVP), and *In re Transpacific Passenger Air Transport Antitrust Litig.* (N.D. Cal., No. C 07-05634 CRB). Mr. Korpus' curriculum vitae is attached as Exhibit 2 for the Court's consideration.

- **Saul P. Morgenstern** and **Laura S. Shores**, Arnold & Porter Kaye Scholer LLP. **Mr. Morgenstern** has represented defendants in a number of antitrust and pharmaceutical multi-district and multi-jurisdictional litigations, including *In re Skelaxin (Metaxalone) Antitrust Litigation* (E.D. Tenn., MDL 2343), *In re Rail Fuel Surcharge Antitrust Litigation* (D.D.C., MDL 1869), *In re Pharmaceutical Industry Average Wholesale Price Litigation* (D. Mass., MDL 1456), *In re Compensation of Managerial, Professional and Technical Employees Antitrust Litigation* (D.N.J. MDL 1471), and *In re Brand Name Prescription Drug Antitrust Litigation* (N.D. Illinois, MDL 997), along with related state actions, and has served on joint defense steering committees and as defense liaison counsel in several such matters. **Ms. Shores** has also represented pharmaceutical clients in consolidated and multi-district class actions brought under federal and state antitrust laws. In addition to *In re Brand Name Prescription Drug Antitrust Litigation* (MDL 997), these include *In re Lamictal Antitrust Litigation* (D.N.J. 2012), and *In re K-Dur Antitrust Litigation* (D.N.J., MDL 1419). Mr. Morgenstern's and Ms. Shores curriculum vitae are attached as Exhibit 3 for the Court's consideration.

Dated: April 28, 2017

Respectfully submitted,

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